No. 48623-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRENDA WING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. In violation of constitutional due process, the trial court held Ms. Wing in breach of the plea agreement without holding an evidentiary hearing.

a. Contrary to due process, there was no evidentiary hearing.

Constitutional due process requires that before a defendant is held to have breached a plea agreement, the court must hold an evidentiary hearing. In re Personal Restraint Pet. of James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). A defendant need not demand an evidentiary hearing and, unless the State can prove waiver, the issue may be raised for the first time on appeal. Id. at 851; State v. Morley, 35 Wn. App. 45, 47-48, 665 P.2d 419 (1983). The State agrees this is the law. Br. of Resp't at 9.

The trial court held a hearing on the issue of breach. The court, however, did not hold an *evidentiary* hearing. An "evidentiary hearing" is a "hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented." HEARING, Black's Law Dictionary (10th ed. 2014); State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (quoting Black's Law Dictionary 738 (8th ed. 2004) (abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Consistent with this meaning, the James court contemplated that witnesses would be called and that the

State would have to prove breach by a "preponderance of *the evidence*." James, 96 Wn.2d at 850 (emphasis added).

The State does not contend that Ms. Wing waived her right to an evidentiary hearing. Rather, the State contends that the court actually held an evidentiary hearing. Br. of Resp't at 7, 13. The record does not support the State's position. No witnesses were called. No testimony was heard. No evidentiary procedure was used to authenticate the "appendices" attached to the parties' filings. See ER 901. While the State attempted to have the recording of the jail call made part of the record, it was not actually admitted,[1] and the court did not bother to listen to it before ruling. RP 18, 40-41. The court simply heard arguments from the lawyers. This is not an evidentiary hearing. Cf. Hughes, 154 Wn.2d at 154-55 (consistent with definition of "evidentiary hearing," evidence was presented at sentencing hearing to support restitution order where witnesses were called to testify and exhibits were admitted).

The State maintains that unlike the line of cases[2] cited by Ms. Wing, evidence was presented to the trial court in the form of the paper documents attached to the parties' filings. Br. of Resp't at 15. Contrary to

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[1] The clerk's office for Lewis County stated that it did not have the recording. Counsel secured a copy after inquiring with the trial prosecutor. A copy can be provided upon the court's request.

[2] Br. of App. at 19-21.

the State's contentions, these documents were not necessarily admissible. First, they were not authenticated. ER 901. Second, they are hearsay. ER 801(c). The State asserts that Ms. Wing's statements are not hearsay under the party-opponent rule. ER 801(d)(2). The State fails to recognize there is still a layer of hearsay. See ER 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.") The authors in the documents are making out of court assertions as to what Ms. Wing (and others) said. This is hearsay. State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006) (while child's statements to nurse fell within hearsay exception, nurse's report recounting child's statements to her was still inadmissible because it was a second level of hearsay).

The State maintains no testimony was needed. But testimony would have been highly probative on the issue of breach, which—according to the State, turned on whether Ms. Wing *lied* during her extensive interview with law enforcement. This required proof of Ms. Wing's intent when she made her statements during the interview. LIE, Black's Law Dictionary (10th ed. 2014) ("A false statement or other indication that is made with knowledge of its falsity; an untruthful

communication intended to deceive.").[3] Further, while testimony may not always be necessary to determine breach, it is still required that "the defendant be given an opportunity to call witnesses." James, 96 Wn.2d at 850. Here, the trial court did not ask Ms. Wing if she wished to call witnesses. Thus, no such opportunity was afforded.

b. The issue is properly raised for the first time on appeal as manifest constitutional error.

Notwithstanding the caselaw, including James and Morley, the State argues that Ms. Wing may not raise this issue for the first time on appeal because it is not "manifest" constitutional error. Br. of Resp't at 16-20; RAP 2.5(a)(3). The State is wrong.

A RAP 2.5(a)(3) analysis asks: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). As the State concedes, the first part of this test is met because the issue is plainly constitutional. Br. of Resp't at 17.

The second part of the test is satisfied when the error is manifest from the record. This means there is a showing of "actual prejudice."

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[3] See http://www.npr.org/sections/thetwo-way/2017/01/25/511503605/npr-and-the-l-word-intent-is-key (refusing to call President Trump a liar because NPR could not tell what Mr. Trump's intent was in making particular statements).

Kalebaugh, 183 Wn.2d at 583 (internal quotation and citation omitted). There is actual prejudice when "the asserted error had practical and identifiable consequences." Id. (internal quotation and citation omitted). The appellate court determines this by placing itself in the place of the trial court and ascertains if the court could have corrected the error. Id. For example, a jury instruction misstating the law on the meaning of "beyond a reasonable doubt" qualified because "the trial court should have known" this was a misstatement. Id.

This analysis should "not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The rule "serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred." Id.

Here, the record shows the trial court failed to hold an evidentiary hearing in violation of due process. The record does not show a knowing, voluntary, and intelligent waiver by Ms. Wing of an evidentiary hearing. In re Personal Restraint of Schley, No. 73872-1-I, slip. op at 10, 2017 WL 684265 (Wash. Ct. of App. Feb. 21, 2017) ("we will not presume waiver

of a constitutional right where the State cannot show it was made knowingly, intelligently, and voluntarily").[4] Given that this due process right is well-established, the "trial court should have known" an evidentiary hearing was required and also could have corrected the error by obtaining a valid waiver from Ms. Wing. Kalebaugh, 183 Wn.2d at 583. This error had practical and identifiable consequences because had an evidentiary hearing been held, the trial court could have reached a different conclusion on whether Ms. Wing breached the agreement. "Actual prejudice" is established because Ms. Wing was not sentenced under the terms of the plea agreement, which contemplated a sentence of 146 to 194 months. State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002); CP 46. Rather, she was sentenced to 416 months. "Because failure to adhere to a plea bargain implicates due process, this court can accept review under the 'manifest error affecting a constitutional right' standard." Sanchez, 146 Wn.2d at 346. Accordingly, this Court should hold that RAP 2.5(a)(3) is satisfied and address the issue.

c. The remedy is reversal and remand for an evidentiary hearing before a different judge.

The State agrees the remedy for this error is reversal and remand to the trial court for a proper evidentiary hearing. James, 96 Wn.2d at 850-

[4] Available at https://www.courts.wa.gov/opinions/pdf/738721.pdf.

51; Br. of Resp't at 20. The Court should hold that Ms. Wing was deprived of due process of law and remand for an evidentiary hearing. The State does not disagree that remand should be before a different judge. Br. of App. at 21; State v. Solis-Diaz, __ Wn.2d __, 387 P.3d 703, 706 (2017) ("where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge.").[5]

2. Under the undisputed facts and as a matter of law, Ms. Wing did not breach the terms of the plea agreement.

In deciding that Ms. Wing had breached the agreement, the trial court misinterpreted the agreement. Br. of App. at 22-26. The State agrees that this Court's review of this dispute is de novo. Br. of Resp't at 21. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). Thus, no deference is owed to the trial court's interpretation.

Section 7(a) was the key provision of the agreement. It stated that the State was entitled to refile the enhancements or aggravators if it could prove that Ms. Wing "provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the

[5] Coincidently, the trial judge in Solis-Diaz was the same judge in this case, Judge Nelson Hunt. Judge Hunt appears to have since retired so the case will necessarily have to go before a different judge. Nevertheless, it is still appropriate for this Court to disqualify Judge Hunt. Solis-Diaz, 387 P.3d at 707 (reversing Court of Appeals and ordering that Judge Hunt be disqualified on remand).

absence of agreement, by the defendant's failure of two polygraphs administered by licensed polygraphists, one of whom is selected by the defense." CP 47 (emphasis added). Ms. Wing did not agree that irrefutable evidence proved she provided a false statement of material fact. CP 189; RP 24, 37. And, having passed of two of the three polygraphs that were administered by licensed polygraphists, she had not failed two polygraphs administered by licensed polygraphists. RP 25; CP 160, 196, 199. Because the State did not meet its burden to prove section 7(a), there was no breach by Ms. Wing, and the State breached the agreement by refiling the aggravators.

Citing the seminal case of Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), the State argues that the "context rules over plain meaning" and that section 7(a) must be read in the "context" of section 1. Br. of Resp't at 28. While Berg endorsed the "context rule"—meaning that the circumstances surrounding the agreement are admissible even if there is no ambiguity in the language of the contract—the court reaffirmed: "It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." Berg, 115 Wn.2d at 669 (quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)). The State does not point to any surrounding circumstances in support of its contextual interpretation. Rather, the State

argues that section 7(a) can be read out of the agreement based on the language of section 1. Berg does not support such a freewheeling interpretative approach and should be rejected because it renders section 7(a) superfluous. See Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850 (2012) ("An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.").

The State hypothesizes that under Ms. Wing's interpretation, she could have refused to take a polygraph, resulting in her never being in breach of the agreement because the State cannot force to her to agree that there is irrefutable evidence of a false statement regarding a material fact. Br. of Resp't at 27. But the agreement contemplated that Ms. Wing would take at least two polygraph examinations, as both sections 2 and 7 show. Section 2 contemplates "a series of polygraph examinations":

> Any statement provided by Brenda A. Wing may be corroborated by the State as true and/or she may pass a series of polygraph examinations (the number of exams and scope of questions to be determined by the State after consultation between the state examiner and the defense polygraphist with deference given to the examiners in this area of their expertise).

CP 46. Section 7(a) contemplates that Ms. Wing will participate in multiple polygraphs because it provides that the State may refile the

aggravators if it can prove Ms. Wing failed "two polygraphs administered by licensed polygraphists, one of whom is selected by the defense." CP 47

Moreover, the State's hypothetical is just that, a hypothetical. The record does not show that Ms. Wing refused to submit to any polygraphs. She submitted to four polygraphs, three of which were administered by licensed polygraphists. CP 158-60, 195-99, 220-23. Unlike the prosecution, Ms. Wing adhered to her implied duty of good faith and fair dealing. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (recognizing there is an "implied duty of good faith and fair dealing in every contract"). Had Ms. Wing refused to submit to a polygraph, she would likely have been in breach of the agreement.

Nothing in the record indicates that Ms. Wing understood section 1 could be read to mean that the language of section 7(a) does not mean what it says. To "interpret" that provision in a manner that effectively reads it out of the contract violates due process because the record does not show that Ms. Wing understood it could be read in this manner when she pleaded guilty. State v. Thomas, 79 Wn. App. 32, 39-41, 899 P.2d 1312 (1995) (recognizing that "a plea is valid only if the defendant understands its consequences at the time it is entered" and that nothing in the record showed defendant understood meaning the State ascribed to the

agreement); 5/7/15RP 1-9 (guilty plea hearing). Contrary to the State's suggestions, Ms. Wing need not prove what her understanding of the agreement was. See Br. of Resp't at 26-27.

This Court should hold that the trial court misconstrued the agreement. The result is that the State violated the agreement by refiling the aggravators. Ms. Wing should be permitted to either withdraw her guilty plea or seek specific enforcement of the agreement. Further proceedings should be before a different judge. The State does not express disagreement as to these remedies.

3. Ms. Wing did not materially breach the plea agreement.

The trial court also erred in concluding that the paper record before it constituted *irrefutable* evidence proving that Ms. Wing had been untruthful about material facts during her extensive interview with law enforcement. Br. of App. at 26-34. A review of the record does not support the trial court's determination that Ms. Wing materially breached the agreement.

The State agrees that review on this issue is *de novo*. Br. of Resp't at 29. The State also appears to agree that it bore the burden of presenting irrefutable evidence of a false statement of material fact. Br. of Resp't at 29-30.

Concerning Ms. Wing's statements as they related to the "conditioning" (a term not used during the interview), the State does not defend its false representation below to the trial court that "when Ms. Wing talked to us she told us that she had nothing at all to do with that at all." RP 20; Br. of App. at 29. In her statement during the interview on this topic, Ms. Wing did not say this. CP 74. In response to the officer's follow up question about whether Ms. Wing put a towel over J's mouth while Danny hit J, she answered affirmatively. CP 75. She also admitted that there were times that she held J down. CP 77. Even if the record could be read to support a conclusion that Ms. Wing omitted that she held J down during the "conditioning," irrefutable evidence does prove that this omission was intentional. And any nondisclosure on this topic was not material because Ms. Wing admitted to being involved in this abuse. CP 74-76.

As for Ms. Wing not disclosing that J had not actually put his hand over her baby's face, the State also did not prove by irrefutable evidence that Ms. Wing had intentionally omitted this fact. That Ms. Wing may have recalled later during her call from jail that what she had said about J covering the baby's face was untrue, this does not prove the earlier omission was intentional. Regardless, it was also immaterial because Ms.

Wing disclosed that she had told Danny that J had put his hand over the baby's face and that Danny thereafter started hitting J.

Concerning what happened at the restaurant, Ms. Wing initially recalled that it had been Danny who had spanked J in the restroom. CP 66. She later recalled that she had spanked J in the restroom. CP 159, 161. Ms. Wing's purported failure to disclose this fact during the interview was not proven to be intentional by irrefutable evidence. Ms. Wing admitted to spanking J many times. CP 76. This shows it is unlikely that Ms. Wing intentionally decided to not disclose that she had spanked J in the restroom at the restaurant.

Finally, as to Ms. Wing's statements about what happened while Danny was in jail, Ms. Wing did not deny disciplining J. CP 86. That she later recalled that she had spanked J during this time is not irrefutable evidence that she intentionally chose to omit this fact. The State emphasizes Ms. Wing's statement from the interview stating that she did not hit J while Danny was jail. Br. of Resp't at 36 (citing CP 86). In the same statement, however, Ms. Wing also said she was "really messed up on heroin" at that time, which may have interfered with her memory. CP 86. Ms. Wing admitted to hitting and spanking J at other times, so it is unlikely that she purposefully chose to not disclose that she had spanked J

while Danny was in jail. Further, any lack of disclosure was immaterial. Br. of App. at 33.

The State did not prove by irrefutable evidence that Ms. Wing intentionally provided a false statement of material fact during her interview with law enforcement. The error requires reversal. Ms. Wing should be permitted to withdraw her plea or enforce the agreement. The State does not argue this remedy is improper.

4. Discretionary legal financial obligations were improperly imposed against Ms. Wing.

The trial court imposed $3,000 in legal financial obligations. CP 182. Of this amount, at least $2,200 was discretionary. Br. of App. at 34. In choosing to impose these discretionary amounts, the trial court only cursorily asked Ms. Wing whether she thought there was anything about her that would prevent her from finding employment upon her release (about three decades into the future), to which Ms. Wing said no. RP 47.

The trial court's inquiry into Ms. Wing's ability to pay was not meaningful or adequate. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) ("The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay."). The record does not show that the court used GR 34 in assessing whether Ms. Wing was indigent. Id.; City of Richland v. Wakefield, 186

Wn.2d 596, 606, 380 P.3d 459 (2016). Following Blazina and Wakefield, this Court should hold that the inquiry was inadequate and reverse.

The State suggests that a detailed inquiry was not necessary because Ms. Wing was represented by private counsel at the trial proceedings. Br. of Resp't at 39. There was no showing that Ms. Wing herself paid for private counsel. Her family likely provided the funds for a private attorney.

The Court should remand for a proper inquiry into Ms. Wing's ability to pay discretionary legal financial obligations.[6]

B. CONCLUSION

Properly construed, Ms. Wing did not violate her agreement with the State. Neither did she materially breach the agreement. The Court should reverse and remand with instruction that Ms. Wing may withdraw her guilty plea or choose to enforce the agreement. Alternatively, the Court should reverse and remand for an evidentiary hearing on the issue of breach. Proceedings should be before a different judge.

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[6] Concerning costs on appeal, the State indicates that it will not be seeking a cost bill due to amended RAP 14.2. Br. of Resp't at 39-40. However, contrary to the State's argument, amended RAP 14.2 does not moot the issue. The rule keeps the pertinent language authorizing this Court to direct that no costs will be awarded in the decision terminating review. RAP 14.2 (permitting court to direct that costs will not be imposed "in its decision terminating review").

DATED this 28th day of February, 2017.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 48623-7-II
v.	)	
	)	
BRENDA WING,	)	
	)	
Appellant.	)	

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